Before the Federal Maritime Commission

AMERICAN WAREHOUSING OF NEW YORK, INC., Complainant, v. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, Respondent.	)	Docket No. 04-09 and Docket No. 05-03

RESPONDENT'S REPLY TO EXCEPTIONS

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RESPONDENT'S REPLY TO EXCEPTION

Comes now The Port Authority of New York and New Jersey (" the Port Authority") and submits the following reply to the exceptions filed by American Warehousing of New York, Inc. ("AWI") in these consolidated proceedings.

INTRODUCTION

Throughout these proceedings, the Complainant, AWI, has maintained that the Port Authority has violated and is violating the Shipping Act by refusing to "negotiate a long-term lease" with AWI so as to permit AWI to continue using a Port Authority owned warehouse located at Pier 7 in Brooklyn as a cocoa storage facility into the indefinite future. AWI is unable to point to any statutory language or Commission precedent that could be relied upon to require such an absurd interference with the rights of the Port Authority to conduct its business in accordance with its best judgment. AWI does not and cannot point to another tenant with whom the Port Authority has entered into or proposes to enter into a "long-term" lease agreement for the Pier 7 warehouse. It

has not and cannot demonstrate that it has been willing to match the terms offered by or to such an imagined alternative "long-term tenant." It has not and cannot demonstrate that the Port Authority has a legal obligation to permit the use of its warehouse as a cocoa storage facility as opposed to any other use the Port Authority may determine is in its best interests and the best interests of the Port District in general. In short, AWI cannot come before this Commission and successfully argue that the Commission can or should order the Port Authority to use its property in a manner that is contrary to its wishes.

This is not a situation where the Port Authority is alleged to have discriminated against on cocoa storage company in favor of another or even one warehouse operator in favor of another. In these cases, AWI contends that because the Port Authority has chosen to enter long-term lease arrangements with terminal operators to provide for the movement of tremendous volumes of intermodal containers that it must also enter into a "long-term" lease with AWI for a cocoa storage facility.

In fact, these cases are not even really about the refusal of the Port Authority to enter into a "long-term" lease with AWI. It must be noted that the first of the complaints herein was not filed when the Port Authority Board of Commissioners made it clear in July of 2002 that it would not permit an extension of the lease that was retroactively entered into in November of 2002. It was not filed when the lease expired in April of 2003. It was not even filed when the Port Authority made it abundantly clear in February of 2004 that it was not interested in doing business with AWI because of its failure to pay rent, its occupation without permission, and without compensation, of additional space at the warehouse and in violation of the lease option provisions. Indeed, it was only filed when the Port Authority took steps in the summer of 2004 to evict AWI first from the

portion of the warehouse where it was squatting without permission and without compensation, and then sought to evict AWI from the entire leasehold. And, of course, the complaint was not filed with the real expectation that the Commission would grant the relief that AWI pleaded, $15 million in reparations for a company that had not shown a profit or accumulated any retained earnings during its several year existence. Indeed, the complaint was filed for the sole purpose of delaying the eviction proceedings so that AWI could continue to use the Port Authority's property without just compensation. The delaying tactics employed by AWI throughout these proceedings, and the second frivolous complaint filed as the Port Authority moved for Summary Judgment on the first complaint, all bear witness to this improper, but highly effective strategy.

Now, after the Administrative Law Judge has properly recommended that the complaints be dismissed, AWI comes forward with more outrageous claims and contentions. It now contends that the Administrative Law Judge erred in engaging in an ex parte contact without the slightest indication of whether such a contact really occurred and if so how such a contact could have prejudiced AWI. It also contends that it has been denied due process by the late admission of numerous exhibits when those very exhibits were sponsored by AWI and offered only with the filing of its brief long after the close of the record. It has retained five separate counsel during these proceedings using those counsel substitutions as a basis for further delays and claims that it has not been given enough time to prepare its case.

As will be discussed below, the Administrative Law Judge did err in his conclusion that the Port Authority decision in July of 2002 not to extend the AWI lease was before AWI's failure to pay rent. However, that error favors the position of AWI not

the position of the Port Authority. In all other respects the decision of the Administrative Law Judge is correct in both fact and law and should be adopted by the Commission and the cases dismissed without further process.

THE COMMISSION MAY NOT, AS A MATTER OF LAW, GRANT THE RELIEF REQUESTED BY COMPLAINANT

The original complaint in this proceeding alleges that the Port Authority has unreasonably discriminated against AWI, and has unreasonably refused to negotiate with AWI. The complaint alleges that the Port Authority has entered into "long-term" leases with other preferred marine terminal operators while refusing to enter into a "long-term" lease with AWI. The complaint seeks to have the Commission order that the Port Authority enter into a "long-term lease" with AWI at an undetermined price, and with undetermined terms. The refusal on the Port Authority's part to enter into such a long-term lease is alleged to prejudice AWI and violate Sections 10(d)(3) and 10(d)(4) of the Shipping Act of 1984. 46 U.S.C. app. §§ 1702(d)(3) and 1702(d)(4).

In *Ceres Marine Terminal, Inc., v. Maryland Port Administration*, 27 SRR 1251, 1270-1 (1997), the Commission outlined the basic requirements that a complaining marine terminal operator must meet in order to sustain a claim of unreasonable preference or prejudice.

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship[1], (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting

[1] "In essence, if the cargo moves in substantially similar transportation circumstances, it is not necessary for the purpose of meeting this criteria (sic) that the parties be in direct competition with one another." Footnote in the original.

> prejudice or disadvantage is the proximate cause of injury. *Distribution Services,* 24 SRR at 720 The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. *Cargill, Inc. v. Waterman Steamship Corp.,* 24 FMC 442, 461-462 [21 SRR 287 (1981).

AWI has failed to demonstrate that it has been treated differently than other similarly situated parties within the Port of New York and New Jersey. The complaint does allege and the evidence did demonstrate that the Port Authority has refused to enter into a long-term lease with AWI while it has entered into long-term leases with Port Newark Container Terminal LLC, Maher Terminals, Inc., Maersk Container Service Company, Inc and New York Container Terminal, Inc. Those lease agreements have all been filed with the Commission, are publicly available, and were admitted into the record without objection. AWI made no effort, however, to indicate how its breakbulk cocoa operation using a cargo shed in Brooklyn is similarly situated with container operations using hundreds of acres of land in New Jersey and on Staten Island.

It was fundamental to the Commission's holding in *Ceres* that Ceres had been prejudiced, that the Commission found Ceres was willing and able to pay the same price and make the same commitments to the Maryland Port Administration as the preferred ocean carrier. Thus, the two had indeed been treated differently. Here AWI has made no showing that it is or was ever prepared to pay the same price or make the same commitments as Port Newark Container Terminal LLC, Maher Terminals, Inc Maersk Container Service Company, Inc. or New York Container Terminal, Inc., and obviously the transportation characteristics of the AWI cocoa storage operation and those of the transfer operations of the large container terminals could not be more different.

Accordingly, the basic requirement of *Ceres* that the allegedly preferred and prejudiced parties must be similarly situated has not and cannot be met.

It must be noted that AWI has not alleged that it was prejudiced while some other terminal operator seeking to use the Pier 7 warehouse was offered a "long-term" lease while it was not. There is nothing in the record to support such a claim and the claim was never raised. Accordingly, the only allegedly preferred terminal operators are those container terminal operators noted above. To the extent that they are not similarly situated with AWI, and they are not, the inquiry must end.

In addition, it must be noted that AWI is not merely seeking an order from the Commission that the Port Authority must not unreasonably refuse to deal with it or that the Port Authority must not unreasonably refuse to negotiate with it. AWI seeks an order that the Port authority must negotiate a "long-term" lease with it. Stated differently, the Port Authority must, according to AWI, dedicate the Pier 7 warehouse to AWI for its use as a cocoa storage facility without regard for the wishes of the Port Authority. Not surprisingly, AWI is unable to offer any precedent for this requested extraordinary intrusion into the business decisions of the Port Authority since the Commission has never prescribed such relief. Again, it must be noted that this is not a case where the Port Authority has preferred some other tenant for the Pier 7 warehouse facility. It is merely that the Port Authority does not want to enter into a "long-term" relationship with AWI.

TO THE EXTENT THAT THE ADMINISTRATIVE LAW JUDGE HAS ERRED IN THE CONDUCT OF THESE PROCEEDINGS, THOSE ERRORS HAVE UNIFORMLY FAVORED THE COMPLAINANT

The Administrative Law Judge Should Have Granted The Motion For Summary Judgment

As discussed above, the relief requested by AWI herein is beyond the jurisdiction of the Commission to grant. AWI would have the Commission order the Port Authority to commit its property to a use that it has chosen not to engage in, and order the Port Authority to engage in that use for some unspecified "long-term" and at a price and under conditions that are also unspecified. Such relief would require that the Shipping Act be read as a complete regulatory regime that would substitute the judgment of the Commission for that of the Port Authority. The Commission has never interpreted its statutory mandate in such an intrusive and heavy-handed fashion. Since the requested relief was beyond the scope of the Act, the Motion for Summary Judgment filed by the Port Authority in June of 2005 should have been granted by the Administrative Law Judge.

The Motion should have been granted on a wholly separate basis. As discussed above, AWI never sought to compare its alleged treatment by the Port Authority with treatment accorded to any even remotely similarly situated terminal operator. The comparisons of a cocoa warehouse operation with three of the largest container terminals in the nation are indeed laughable. Since those vastly different terminal operations are the only ones mentioned in the complaint and in the prehearing submissions by AWI, the Motion for Summary Judgment should have been granted on that basis as well. These errors by the Administrative Law Judge can hardly be said to prejudice any party other than the Port Authority.

The Administrative Law Judge Partially Misconstrued The Motives Of The Port Authority Board Of Commissioners In Refusing To Extend The AWI Lease At The Pier 7 Warehouse

In his Initial Decision, the Administrative Law Judge recognizes that the Port Authority Board of Commissioners can make such use of the Pier 7 Warehouse, or underlying real estate, as it chooses in the exercise of its sound business discretion. In this regard he is correct, and should have granted the Summary Judgment Motion on that basis alone. However, should there be any reason to examine the motives of the Port Authority Board of Commissioners in deciding in June of 2002 not to offer an extension of the short term retroactive lease to AWI upon its expiration on April 30, 2003, ample additional justification is provided for by AWI's consistent refusal to pay rent in a timely manner.

Judge Krantz finds that AWI's failure to pay rent began with the expiration of the Pier 7 Warehouse lease in May of 2003. While that is true with respect to the Pier 7 property, it totally overlooks the AWI payment history with respect to other Port Authority properties that it had leased or occupied. The unrebutted testimony of Patricia Keough demonstrates beyond question that AWI had historically and habitually failed to pay rent in a timely manner on Piers 5 and 6. With respect to Pier 5 for the period beginning in January 1999 through April 2003 (52 months), AWI was over 30 days late 13 times, over 60 days late 8 times and over 90 days late 24 times with only 7 payments having been made less than 30 days late. Similarly, with respect to Pier 6 for the same 52 month period, AWI was over 30 days late 12 times, over 60 days late 8 times and over 90 days late 24 times with only 8 timely payments. On Pier 7 no rent was paid from December 1999 through February 2003.

In fact, at hearing, counsel for AWI commented to Patricia Keough of the Port Authority:

> Q. Would it surprise you to learn that it was company policy that if they didn't have a lease and they were trying to negotiate and leverage with the Port Authority that they would withhold rent? (Tr. 453)

It is hardly surprising that the Port Authority Board of Commissioners would not favor a continuing business relationship, particularly on a "long-term" basis with a company that consistently failed to pay its rent in a timely manner and that had a corporate policy of withholding rent as a negotiating tool in order to extract more favorable terms from its would-be landlord. In short, the Port Authority had every reason not to continue to do business with AWI.

The Administrative Law Judge's Error In Admitting Complainant's Late Filed Exhibits Could Prejudice The Port Authority But Could Not And Does Prejudice AWI

The oldest court room joke in memory is the story of the young man who killed his mother and father and then begged for mercy on the ground that he was an orphan. AWI is in much that situation here. Well after the close of the record, and contemporaneous with the filing of its brief, AWI filed numerous exhibits claiming that they were essential to its theory of the case as developed and presented by new counsel as "redirect evidence." These exhibits, and the theories that they allegedly supported, were presented by counsel well after the submission of their case in chief, and after their rebuttal presentation as well. In fact, their admission was clear procedural error and could have prejudiced the Port Authority since it had no opportunity to respond to them or to the theories they were to support.

for its unilateral occupation. It presents demonstrably false testimony regarding the configuration of the Pier 7 warehouse and its entrances and exits, and then suggests that the Administrative Law Judge somehow prejudiced AWI by looking at the warehouse when dozens of pictures of the interior and exterior of the warehouse are in the record.

AWI claims that Port Authority staff and even its Board of Commissioners have some unexplained animosity toward it. It alleges that the Port Authority boycotted ships and prevented it from unloading cocoa at the Pier 7 location while being unable to show a single ton of cocoa that was not unloaded and then stored in the Pier 7 warehouse for which it was not paying rent or other fees. And most remarkably, AWI insists that the Port Authority's actions have caused it to loose customers and business while admitting that it has so much business crammed into the Pier 7 warehouse that it must occupy space that it doesn't rent. In the face of all this, AWI demands that its case be taken seriously and that the Judge deal with this deluge of unsupported allegations as if they were proven facts.

In *Mediterranean Pools Investigation,* 9 F.M.C. 266 (1966), the Commission dealt with a claim that the Initial Decision had not adequately addressed all the points raised by a party in its brief. The Commission stated:

> The courts have made it clear that section 8(b) [of the Administrative Procedures Act] does not require that a separate finding need be made on each exception to the Examiner's decision where the agency's decision unmistakably informs respondent of its ruling on all exceptions. *NLRB v. State Center Warehouse & cold Storage Co.,* 193 F.2d 156 (9th Cir. 1951). By the same token, an Examiner need not make a separate finding on each proposed finding submitted by a party. See *NLRB v. Sharpless Chemicals, Inc.,* 209 F.2d 645 (6th Cir. 1954).

The Administrative Law Judge has made all the findings and conclusions to dispose of this matter. He has properly noted that AWI has failed to meet the *Ceres* tests to establish an allegation of unreasonable preference and prejudice, and that its claim that the Port Authority had some obligation to enter into a "long-term" business relationship with it cannot stand. He further notes that the alleged ship boycotts did not in fact occur, and the Port Authority consistently allowed AWI to unload cocoa into the Pier 7 warehouse even though AWI had no legal right to do so.

Inasmuch as AWI has not and cannot meet the basic requirements necessary to establish even a prima facie case of preference or prejudice, it is unnecessary to review the alleged procedural errors that AWI contends have been made in the closing of discovery by the previous Administrative Law Judge. No amount of additional "fishing" through Port Authority and third party files can serve to cure the fatal legal flaws that exist on the face of the complaints filed in this matter. The Port Authority has no legal obligation to enter into a "long-term" lease with AWI so as to permit AWI to continue to store cocoa at the Pier 7 warehouse when the Port Authority doesn't want its property used for that purpose.

CONCLUSION

In view of the foregoing, as well as the more complete proposed findings of fact and conclusions of law contained in the Port Authority's initial brief filed April 24, 2006, the Initial Decision of the Administrative Law Judge should be adopted with respect to the material findings and conclusions contained therein, and these consolidated cases should be discontinued without further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by LAROE, WINN, MOERMAN & DONOVAN, P.L.C., Attorneys for Respondent, the Port Authority of New York and New Jersey.

That on the **6th day of October, 2006**, I caused 2 copies of the within Brief for Respondent in the above captioned matter to be served upon:

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Unless otherwise noted, an original and 15 copies have been sent to the Commission via hand delivery on the same date.

October 6, 2006

John C. Kruesi, Jr.
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